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In The

Supreme Court of the United States

October Term, 1982

ROBERT W. BAILEY and STEVEN M. WILLETT, in their capacity as supervisory officers of the GRACE BIBLE CHURCH CHRISTIAN SCHOOL,

Petitioners,

vs.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL AND GREGORY R. ANRIG, COMMISSIONER OF EDUCATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Judicial Court for the Commonwealth of Massachusetts

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QUESTIONS PRESENTED

1. Whether it is necessary for the State to prove that no less drastic means exists for implementing a reporting statute against a church school, such statute requiring private schools to report names, ages and residences of children in attendance to Massachusetts school authorities, where it is claimed that as applied the statute violates the right to religious and associational freedoms as guaranteed by the First and Fourteenth Amendments to the U. S. Constitution.

2. Whether the granting of summary judgment is improper where (a) bona fide constitutional claims involving First Amendment freedoms exist, and (b) an indefinite and inadequate factual foundation hinders a full exploration of such claims, a ruling on which could affect many others in a similar position.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

ROBERT W. BAILEY and STEVEN M. WILLETT, in their capacity as supervisory officers of the GRACE BIBLE CHURCH CHRISTIAN SCHOOL, the Petitioners herein, pray that a writ of certiorari issue to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered in the above-entitled case on June 2, 1982.

OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts in *Attorney General v. Robert W. Bailey*, is printed in Appendix A hereto, at APP. 1, *infra*, and is reported at 386 Mass. 367 (1982). The opinion of the Superior Court of Suffolk County, Massachusetts is unreported but is printed in Appendix B hereto, *infra*, at APP. 22.

JURISDICTION

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts (Appendix A, *infra*, at APP. 1) was entered on June 2, 1982. The jurisdiction of the Supreme Court is invoked under 28 U. S. C. § 1257 (3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the Annotated Laws of Massachusetts and the United States Constitution are involved in the questions presented:

Annotated Laws of Massachusetts

G.L. c.72, § 2. REGISTRATION OF CERTAIN MINORS; PRIVATE SCHOOL TO REPORT CERTAIN ENROLLMENTS, ETC.

The school committee of each town shall ascertain and record the names, ages and such other information as may be required by the department of

education, of all minors residing therein between five and sixteen, and of all minors over sixteen who do not meet the requirements for the completion of the sixth grade of the public schools of the town where he resides. The school committee of each town shall also ascertain the number of pupils, regardless of age, whose parents or guardians are residents of the town and who are enrolled for full-time attendance, in kindergarten and grades up to and including grade twelve, in public and vocational schools and classes in the commonwealth and nonpublic schools anywhere. Whoever, in control of any such minor, withholds information sought by a school committee or its agents under this section or makes a false statement relative thereto, shall be punished by a fine of not more than fifty dollars. Supervisors of attendance, under the direction of the committee and superintendent of schools, shall have charge of the records required by this section, shall be responsible for their completeness and accuracy, and shall receive the co-operation of principals, teachers and supervisory officers in the discharge of their duties hereunder. A card, as prescribed by the department, shall be kept for every child whose name is recorded hereunder. Supervisors of attendance shall compare the names of children enrolled in the public and private schools with names of those recorded as required herein, and examine carefully into all cases where children of school age are not enrolled in, and attending school, as required by section one of chapter seventy-six.

The annual school committee report shall set forth the number of children recorded as herein required, classified by ages, together with the number attending public or private schools, and the number not attending school, in any given year.

The supervisory officers of all private schools shall, within thirty days after the enrollment or registration of any child of compulsory school age, report his name, age and residence to the superintendent of

schools of the town where the child resides; and whenever a child withdraws from a private school, such officers shall, within ten days, notify said superintendent.

United States Constitution

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Attorney General of the Commonwealth of Massachusetts and the Commissioner of Education, respondents herein, seek to enforce the provisions of G.L. c.72, §2, a school reporting statute, against the petitioners, Rev. Robert W. Bailey and Rev. Stephen M. Willett, pastor and associate pastor respectively of Grace Bible Church of Dracut, Massachusetts. G.L. c.72, § 2 requires the supervisory officers of public and private schools to report annually the name, age and residence of each child of compulsory school age in attendance. Grace Bible

Church is a non-denominational, independent and fundamentalist Church, the membership of which recognizes the Holy Bible as the "inspired and inerrant Word of God." The Church operates all ministries in observance of biblical commands and for the ultimate purpose of spreading the "Good News" in the manner in which "salvation is obtained." Grace Bible Church Christian School, established in September of 1980, is believed by petitioners to be a ministry of the Church in similar manner to the Sunday worship service, Sunday school, and Bible study classes. Further, the church school is believed to be an integral and inseparable part of the Church, not existing as a distinct entity apart therefrom.

Grace Bible Church Christian School provides full time instruction, Monday through Friday, in reading, writing, spelling, history, mathematics, science, geography, language, poetry, art, physical education, physics and the Bible to children in grades one through six. It is a totally Christian curriculum, which is utilized by thousands of church schools throughout the nation, permeated with Biblical verse and truth, and taught entirely from a Christian perspective. As a matter of firm religious conviction the Grace Bible Church can neither seek nor accept approval or funding for its church school from any government agency, state or federal.

In October of 1980, the school committee for the town of Dracut demanded compliance by Grace Bible Church Christian School with the reporting requirements of G.L. c.72, § 2 through Rev. Bailey and Rev. Willett. Upon petitioners' refusal to comply, for what they cited as reasons of firm religious objection thereto, respondents brought the within action for declaratory judgment and

injunctive relief. Petitioners raised the federal questions of concern herein in their Answer to the Complaint as follows:

SECOND DEFENSE

Application of the statutes as cited in the Complaint to Defendants will violate the rights of defendants and children and parents of children enrolled in Grace Bible Church Christian School to the free exercise of religion under the First Amendment of the Constitution of the United States.

THIRD DEFENSE

Application of the statutes as cited in the Complaint to Defendants will violate the rights of the defendants and children and parents of children enrolled in Grace Bible Church Christian School to be free from the Establishment of Religion under the First Amendment of the Constitution of the United States.

FIFTH DEFENSE

Application of the statutes as cited in the Complaint to Defendants will violate the rights of Defendants and children and parents of children enrolled in Grace Bible Church Christian School to freedom of association under the Constitution of the United States.

Respondents moved for summary judgment based on Rule 56 of the Massachusetts Rules of Civil Procedure, contending that no genuine issue of material fact exists and that they were entitled to judgment as a matter of law. Accompanying the motion were the affidavits of the chairman of the school committee and superintendent for the town of Dracut as well as that of legal counsel. The affidavits stated, *inter alia*, the duties of the school committee under G.L. c.72, § 2; the application of such report-

ing statute to Grace Bible Church Christian School; and the latter's refusal to comply. The petitioners responded with the affidavits of Bailey and Willett explaining the religious beliefs of Grace Bible Church, the biblically mandated ministerial characteristics of the church school, and their firm religious conviction against the necessary prior approval of their educational ministry by any civil government.

Subsequent to a hearing consisting of oral argument by counsel only, the Superior Court of Suffolk County granted summary judgment to the Attorney General and Commissioner, addressing the federal questions presented herein as follows:

> Upon consideration of the complaint, defendants' answer and the admissions therein, affidavits, memoranda and oral argument of the parties, it is my considered judgment that there is no genuine issue as to any material fact and the plaintiffs as the moving parties are entitled to a judgment as a matter of law.
>
> The position of the defendants in contesting the constitutionality of the statutes and regulations referred to *supra* is without merit as stated previously herein. I rule that the Commonwealth's interest is of sufficient magnitude to override whatever constitutional interest the defendants may have in refusing to disclose the information requested.

APP. 34. Rev. Bailey and Rev. Willett filed Notice of Appeal to the Appeals Court. The Supreme Judicial Court of Massachusetts granted respondents' application for Direct Appellate Review. In the Brief of Appellants, petitioners raised federal questions in the "Issues Presented For Review":

4. Did the lower court err in not utilizing the three-prong test as enumerated by the U. S. Supreme Court in the cases of *Sherbert v. Verner* and *Wisconsin v. Yoder* in construing the application of G.L. c.72, § 2 to Rev. Bailey and Rev. Willett in light of the protections afforded them by the religion clauses of the First Amendment?

5. Upon consideration of the evidence in support of and in opposition to the Commonwealth's Motion for Summary Judgment, did the lower court err in holding that the Commonwealth's interest is of sufficient magnitude to override whatever constitutional interest the appellants have in refusing to disclose the information requested under G.L. c.72, § 2?

On June 2, 1982, the Supreme Judicial Court affirmed the lower court's holding as follows:

a. Free exercise

* * *

Because of the importance of education in our society, we believe that the State's need for the required information outweighs the incidental burden on the right of the defendants, parents, and children to practice their religion.

b. Establishment clause

* * *

We, therefore, conclude that the judge correctly determined as a matter of law that the application of G.L. c.72, § 2, to the Grace Bible Church Christian School does not violate the establishment clause of the First Amendment.

c. Freedom of association

* * *

In this case, the judge correctly determined as a matter of law that the State's interest in compulsory education is so compelling and the information

sought so relevant that it justifies the burden on the defendants', the parents', and the childrens' right to freedom of association.

• • •

Thus, we conclude that on the very narrow issue of the constitutionality of the reporting requirement, the judge properly granted the plaintiffs' motion for summary judgment.

APP. 21. It is from this ruling that petitioners pray a writ of certiorari issue.

REASONS FOR GRANTING WRIT

1. Certiorari should be granted to decide important questions as to the burden, if any, on the state to show that no less drastic means exist to fulfill state interests when First Amendment Rights are violated.

In the *Bailey* opinion herein, the Supreme Judicial Court of Massachusetts rendered a decision by way of summary proceedings on issues not heretofore addressed by this Court. The court ruled that the state's interest in statutorily requiring church schools unapproved by the state to report names, ages and residences of attendees overrides any violation of religious and associational freedoms. However, petitioners submit that this ruling was made in a manner generally inconsistent with the tests developed through successive precedent by this Court when faced with a consideration of First Amendment claims. Further, it is noted that a recent decision by this Court which will be discussed *infra*, implies a change in the standards utilized by courts in analyzing such claims,

a change for which Rev. Bailey and Rev. Willett seek, among other things, clarification by way of this petition.

a. Freedom of Association

The petitioners submit that the reporting requirements of G.L. c.72, § 2 will have a chilling effect on their religious associational rights as well as those of the parents and children connected with Grace Bible Church Christian School.[1] Parents such as Andre Paquette, Sr., whose affidavit was one of those offered in opposition to respondents' summary judgment motion, might well be deterred from sending their children to the church school for fear of fines or even truancy prosecutions. G.L. c.76, § 2 (fine of $20.00); G.L. c.76, § 4 (fine of $200.00 for inducing child to be absent from school). They are hindered in fulfilling a religious mandate to educate their children under a totally Christian perspective, under which they believe can only be obtained at Grace Bible Church Christian School.

In *NAACP v. Alabama, supra,* this Court ruled that the "freedom to engage in association" is a "'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id.* at 451, 460. In the case at bar, the *Bailey* court recognized that the reporting requirements of G.L. c.72, § 2 had "adverse consequences" on the religious associational rights of the petitioners as well as those of the parents and children associated with the church school. APP. 17.

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[1]Petitioners have standing to raise the associational claims on behalf of such parents and children. *See, NAACP v. Alabama,* 357 U. S. 449, 458-460 (1958).

However, the court erred when, relying predominantly on *NAACP v. Alabama,* it ruled that such infringement was justified in that the "information sought" was "so relevant" to the goal of compulsory education. APP. 18. Relevance petitioners submit, is an inappropriate constitutional standard. In *Shelton v. Tucker,* 364 U.S. 479 (1960), this Court struck down on the grounds of associational freedom, a statute requiring teachers of state-supported schools to disclose all organizational ties. Although it was found that "no question" existed as to "the relevance of a State's inquiry into the fitness and competence of its teachers," the matter did not rest there. *Id.* at 485. It was further determined that any associational abridgement on such teachers "must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* at 489. In the cause herein, respondents' compelling interest in compulsory education is acknowledged. But the court erred in failing to compel respondents to show proof that no less drastic means is available for fulfilling the purposes of G.L. c.72, § 2 as to Rev. Bailey and Rev. Willett.

b. Free Exercise of Religion

As in the case of associational freedom, this Court has likewise applied the less drastic means analysis to claims of free exercise of religion. Beginning with the Court's ruling in *Sherbert v. Verner,* 374 U.S. 398, 406, 407 (1963) (alleged abuse of the unemployment compensation fund) and continuing with *Wisconsin v. Yoder,* 406 U.S. 205, 215, 218, 221 (1972) (alleged violation of compulsory school attendance laws by Amish) and recently *Thomas v. Review Board of Indiana Employment Secur-*

ity Division, 450 U.S. 707, 718 (1981), it has been consistently held that upon the demonstration of a sincerely-held religious belief the free exercise of which is burdened by some statutory requirement, the state must not only show a compelling interest which justifies the infringement but also that no less restrictive alternative means of satisfying that interest exists.

In the cause herein, the court erred in ruling that the application of G.L. c.72, § 2 to the petitioners "has only an incidental burden" on their "right to practice their religion." APP. 11. The demand on petitioners by the Commonwealth for the names, ages and addresses of children attending the church school ministry of Grace Bible Church, of which Rev. Bailey and Rev. Willett are pastors, directly interferes with the Church's religious autonomy. Petitioners submit that this amounts to an "undue" burden which respondents must avoid by some less drastic means if available. *Yoder, supra*, at 220.

c. Less Drastic Means

A review of the record reveals no attempt on the part of the Attorney General or Commissioner of Education "to demonstrate that no alternative forms of regulation would (further the compelling state interest) without infringing upon the First Amendment rights" of Rev. Bailey and Rev. Willett as well as all those connected with the church school. *Sherbert, supra*, at 407. Respondents cannot rest on assertions made in unverified pleadings, briefs, or oral argument of counsel to prove the absence of alternative forms of regulation. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968). The record does show by implication that less drastic

alternatives do exist: the petitioners in the proceedings below offered an uncontroverted affidavit showing that the authorities were able to locate parents who were in alleged violation of the compulsory education law without recourse to the G.L. c.72, § 2 reporting requirements. *See*, affidavit of Andre Pacquette. Moreover, the Court can take judicial notice of the statutory requirement in Massachusetts that annual surveys be made of the residents of all cities and towns who are three years of age or older. G.L. c.51, § 4. Once these names are collected, as they are every year, the local school committee can easily compare them with reports from approved schools to determine who is in compliance with the compulsory education law.

Alternatively, the responsibility for providing the information required under G.L. c.72, § 2 could be placed with the parents themselves either in their individual capacities or through a parent organization established and administered outside the jurisdiction of the Church.

d. The Implications of U.S. v. Lee.

The recent decision of *U.S. v. Lee*, — U.S. —, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) raises important questions not heretofore addressed by this Court concerning the relevance of the less drastic means test in cases such as the case at bar involving First Amendment claims. As applied to the cause herein, if *Lee* modifies or eliminates the test, then the Attorney General and the Commissioner of Education will have been justified in remaining silent on the existence of any alternative means of fulfilling the requirements of G.L. c.72, § 2 as to the children in attendance at Grace Bible Church Christian School despite the

burdens placed on the free exercise and religious associational rights of the petitioners, parents and children.[2]

In *Lee*, a self-employed farmer of the Old Order Amish faith claimed that withholding social security taxes from his employees or paying employer's share of such taxes violated his religious faith. 71 L. Ed. 2d at 127. In its analysis of Mr. Lee's constitutional claim, this Court utilized the first and second tier of the three part test found in *Thomas*, *Yoder*, and *Sherbert*, *supra*, holding that while the social security system interferes with the free exercise of Amish belief "(t)he state may justify a limitation on religious liberty by showing . . . an overriding governmental interest." *Id.* at 132. It was found that the government's interest in "mandatory and continuous participation in and contribution to the social security system is very high." *Id.* at 133. However, this court did not discuss the burden on the state to show that no less drastic means was available. Rather, the "remaining inquiry" by the Court was "whether accommodating the Amish belief will unduly interfere with fulfillment of the governmental interest." *Id.* at 133. Because this could potentially impose a lesser burden of proof on the State when First Amendment claims are raised against the enforcement of a statute such as G.L. c.72, § 2 herein, it is important that this Court clarify the role if any, of the less drastic means test in regard to such claims.

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[2]Petitioners note that although the *Bailey* court did not rely explicitly on the rationale in nor cite *Lee*, its ruling on the constitutional claims herein is analogous. Further, respondents made the court aware of *Lee* before the *Bailey* decision was rendered.

In contrast to the test in *Thomas, Yoder* and *Sherbert, supra,* where the state was required to show that no less drastic means were available to accomplish a compelling interest, the state under the *Lee* rationale would only be required to show that "accommodating" the constitutional claim will "unduly interfere" with the state's compelling interest. The state's interest, rather than the rights guaranteed and protected by the First and Fourteenth Amendments, would be in a preferred position or an assumed standpoint of priority.

Thus, in the cause herein, the fact that, as discussed *supra,* a viable alternative is available (utilization of the Massachusetts annual surveys or parental organizations) would be rendered irrelevant. The Commonwealth would need only argue that petitioners' First Amendment claims "unduly interfere" with the reporting requirements of G.L. c.72, § 2.

As early as *Cantwell v. Connecticut,* 310 U. S. 296, 304 (1940) this Court declared that the state's "power to regulate" in the area of protected freedoms "must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedoms." Petitioners believe that this rule of law continues to apply to claims of infringement on free exercise and religious association. Moreover, petitioners submit that factors unique to the issues in *Lee* distinguish its analysis from the cause herein. Among other things, *Lee* dealt with: a "commercial" activity ongoing in the business marketplace as opposed to a church ministry; taxation as opposed to reporting requirements; and a nationwide benefits system (social security) as opposed to a

statewide aid in purportedly fulfilling compulsory education laws. It is important that this Court clarify by way of granting the writ herein, whether the treatment accorded First Amendment claims by the *Bailey* court is the appropriate standard of review and whether this court has modified the less drastic means test by its decision in *U. S. v. Lee*.

2. Certiorari should be granted to decide important questions concerning the appropriateness of summary judgment in cases involving First Amendment claims.

The *Bailey* opinion presents important questions not heretofore addressed by this Court concerning the role, if any, that summary proceedings play when the party opposing the motion makes claims of interference by the state with First Amendment freedoms. Rev. Bailey and Rev. Willett submit that the Court erred in affirming the granting of summary judgment. Not only are there genuine issues of material fact remaining for further evidentiary proceeding, but because petitioners present bona fide First Amendment claims, which could affect many others in the Commonwealth of Massachusetts holding similar beliefs and positions, the cause herein should have, at the very least, been remanded to the lower court for amplification of the record. Thereupon, petitioners' claims could have been more closely scrutinized.

This Court has long held that when considering the evidence in support of and in opposition to a motion for summary judgment, the court is under a duty to view such evidence most strongly in favor of the party opposing the

motion, giving that party the benefit of all reasonable inferences. *U. S. v. Diebold*, 369 U. S. 654, 655 (1962). However, when such opposing party presents constitutional claims or defenses, the duty of the Court, as discussed below, is more stringent.

On the basis of the pleadings, seven cursory affidavits, exhibits and oral argument of counsel, the *Bailey* court affirmed the granting of summary judgment in favor of the Attorney General and the Commissioner of Education. In summary fashion, the court ruled that the infringement upon the free exercise and religious associational rights of Rev. Bailey, Rev. Willett and the parents and children connected with Grace Bible Church Christian School is overridden by the respondents' interest in the reporting requirements of G. L. c. 72, § 2. This was error.

Kennedy v. Silas Mason Co., 334 U. S. 249, 251, 256 (1948) involved the application of the overtime provisions of the Fair Labor Standards Act to certain persons who worked in a government-owned plant producing munitions. This Court acknowledged therein that when a decision on an issue could potentially affect the rights of many others (in that case other workers), "(n)o conclusion in such a case should prudently be rested on an indefinite factual foundation." In the cause herein, the ruling in *Bailey* on the petitioners' constitutional claims will have a potentially adverse effect on other church schools located in Massachusetts which hold or represent beliefs similar to those found at Grace Bible Church Christian School.[3]

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[3]Petitioners are aware of at least two other cases now pending in Massachusetts brought by the Attorney General

(Continued on following page)

The case of *Perry v. Sinderman*, 408 U. S. 593 (1972) is also pertinent. This Court ruled that where bona fide constitutional claims exist (in that case, the right of a professor to publicly criticize policies of the college administration), summary judgment is improper "without full exploration of the issue." Id. at 595, 598. Not only did the cause herein present "bona fide" First Amendment claims, but genuine questions of material fact which have yet to be addressed at a hearing on the merits. A review of the record shows that it is replete with instances where, upon the affidavits in support of and in opposition to the respondents' summary judgment motion, the lower court either resolved questions of material fact or brought into question the truth or falsity of the religious beliefs petitioners. This was error. *U. S. v. Diebold, supra; see, U. S. v. Ballard*, 322 U. S. 78 (1943) (the truth or falsity of a religious stance is not subject to examination.) Perhaps the most striking example of a material question involves the availability of less drastic means by which the Commonwealth can obtain the information sought under G.L. c.72, § 2 while at the same time not infringing upon the free exercise and associational rights of Rev. Bailey and Rev. Willett. As stated above, the respondents never even properly addressed this matter. *See, First National Bank of Arizona, supra.* Therefore, neither was there a definite factual foundation as called

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against church schools of a like religious persuasion to those found herein. *Francis X. Bellotti, et al. v. Lamar Breazeale*, Civil Action No. 47822, Suffolk County Superior Court (filed 1981) and *Francis X. Bellotti v. Temple Christian Academy and Reverend Bruce Turner*, Civil Action No. 47821, Suffolk County Superior Court (filed April 29, 1981).

for in *Kennedy, supra,* nor were all the relevant issues "fully explored." For the foregoing reasons it was improper for the *Bailey* court to affirm the granting of summary judgment in favor of respondents.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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